CG Technology Sdn Bhd v Cipli Hardware Sdn Bhd & Anor

HIGH COURT (PENANG) — CIVIL APPEAL NO PA-12B-58–10 OF 2017
LIM CHONG FONG J
31 JULY 2018

Tort — Trespass — Damages — Respondents sued appellant for trespass to land and goods and conversion of goods — Respondents claimed for damages — Sessions court found in favour of respondents — Appellants appealed against decision and counterclaimed for breach of tenancy agreement — Whether there was appealable error by learned session court judge that necessitated appellate intervention

The respondents were dealers and manufacturers of hardware, building materials, machinery and spare parts. The respondents had rented a property owned by the appellant ('the property') and due to the failure of the respondents to pay the rental, the appellant had, on 8 October 2012, demanded the respondents to vacate the property. It ought to be noted that the property was originally owned by the first respondent and was sold to the appellant vide a sale and purchase agreement ('the SPA') in which both parties agreed that the first respondent was permitted to continue to occupy the property by renting it from the appellant pursuant to cl 11 of the SPA. After a series of exchange of correspondences, the respondents were permitted to retrieve their materials, goods and equipment left on the property. Problem arose when the respondents discovered that much of their materials as well as many of their goods and equipment left on the property were missing and damaged. Consequently, the respondents filed an action at the sessions court. The sessions court judge allowed the following parts of the respondents' claims: (a) RM3,500 in respect of the motor for the CDI overhead crane; (b) RM17,500 in respect of the mild steel rounds bars; (c) RM19,603.29 in respect of the mild steel plates; (d) RM31,500 in respect of the scrap metal; (e) RM1,426 in respect of a barrel of oil; (f) RM6,200 in respect of two metal containers/dustbin skip; (g) RM117,425 in respect of a unit of wire cutting and straightening machine; (h) RM1,026 in respect of the spare/replaceable business materials; (i) RM1,395 in respect of the ABS pipes; (j) RM12,500 in respect of the costs of upgrading/refurbishing of wire cutting and straightening machines; (k) RM3,682 and RM1,620 in respect of the repair of forklifts; (l) RM16,000 in respect of damages generally; and (m) RM30,000 in respect of damages for trespass. In the present appeal, the appellant appealed against the findings of liability for trespass and conversion together with the respondents' associated heads of claim awarded by the sessions court as well as the dismissal or non-award of the appellant's heads of counterclaim comprising

of breach of tenancy by the first respondent and rectification costs for damage to the property.

Held, allowing the appeal in part with costs of RM1,500:

(1) The existence of a tenancy between the two respondents and knowledge of the appellant thereof were essentially findings of fact of the learned judge and would rarely be disturbed by the appellate court. In addition, there was no breach of prohibition of the SPA because the said tenancy agreement was executed before the completion of the SPA. The learned judge found that the respondent had paid the rent within reasonable time because there was no stipulated time of payment of rent in advance in cl 11 of the SPA. Accordingly, the learned judge found that the appellant was liable in damages for trespass as well as conversion of the chattels belonging to the respondents that were lost or damaged. The court found that there was no error in the analysis and findings of the learned judge that necessitated appellate intervention (see paras 20–22).

(2) The court affirmed the award in respect of the motor for the CDI overhead crane, barrel of oil, metal containers/dustbin skips, spare/replaceable business materials, ABS pipes, repair of forklifts and interest at 5%pa. The court set aside the award for the mild steel rounds bar because there was insufficient judicial appreciation of the evidence adduced by the learned judge. Further, in respect of the award for replacing/refurbishing the wire cutting and straightening machine, the court found that it was an indirect expense arising that was too remote and not reasonably foreseeable, thus not claimable in tort claims. Consequently, this award was also set aside. Lastly, the court set aside the award of RM16,000 for damages because there was duplicity (see paras 29, 33, 43, 45, 54, 58, 61, 66, 71, 75 & 83).

(3) With regards to the award for mild steel plates, the learned judge was correct to award for what was visible from the photographs exhibited only. Nevertheless, there should only be two instead of three pieces of mild steel plates that had been awarded. As to the quantum, the mild steel plates that were used for forklift access were of scrap value only at the material time. As such, the award for the mild steel plates was varied to RM1,837.50 from RM19,603.20. As to the award for scrap metal, the court found that the quantity of scrap metal waste metal components would at best not exceed two tonnes, as such, the court varied the award to RM2,100 from RM31,500. Lastly, in respect of the award for wire cutting and straightening machine, the court found that the lost machine component was only one of seven parts and it was also an old machine, as such, the court varied the award to RM39,142 from RM117,425 (see paras 35–37, 40, 50 & 83).

(4) In respect of the appellant's counterclaim, since trespass had been found by the learned sessions court judge which had been affirmed by the court, the court held that the appellant's claim for a month's rent was unsustainable. The dismissal of the claim was thus affirmed by the court. In addition, there was dearth of relevant photographs evidencing the alleged damage and the cogent corresponding documentary proof of rectification/repair costs incurred. The learned judge was therefore correct in dismissing the claim for rectification costs for damage to the property (see paras 78 & 82).

[Bahasa Malaysia summary

Responden-responden merupakan pengedar dan pengilang perkakasan, bahan binaan, jentera dan alat ganti. Responden-responden telah menyewa bangunan yang dimiliki oleh perayu ('bangunan') dan atas sebab kegagalan responden-responden membayar sewa, perayu telah, pada 8 Oktober 2012, mengarahkan responden-responden untuk mengosongkan bangunan. Perlu diambil perhatian bahawa bangunan itu pada asalnya dimiliki oleh responden pertama dan telah dijual kepada perayu melalui perjanjian jual beli ('PJB') yang kedua-dua pihak telah bersetuju bahawa responden pertama dibenarkan untuk terus menghuni bangunan itu dengan menyewa bangunan itu daripada perayu menurut klausa 11 PJB. Setelah beberapa rantaian persuratan, responden-responden telah dibenarkan untuk mengambil bahan, barang dan peralatan mereka yang berada dalam bangunan itu. Masalah mula timbul apabila responden-responden mendapati bahawa banyak bahan dan juga barang dan peralatan mereka yang ditinggalkan dalam bangunan itu telah hilang dan rosak. Selanjutnya, responden-responden telah memfailkan tindakan di mahkamah sesyen. Hakim mahkamah sesyen membenarkan tuntutan responden-responden yang berikut: (a) RM3,500 berkenaan dengan motor bagi kren gantung CDI; (b) RM17,500 berkenaan dengan bar bulat keluli lembut; (c) RM19,603.29 berkenaan dengan plat keluli lembut; (d) RM31,500 berkenaan dengan besi buruk; (e) RM1,426 berkenaan dengan sebuah tong minyak; (f) RM6,200 berkenaan dengan dua bekas keluli; (g) RM117,425 berkenaan dengan sebuah mesin memotong dan meluruskan wayar; (h) RM1,026 berkenaan dengan bahan binaan gentian; (i) RM1,395 berkenaan dengan paip ABS; (j) RM12,500 berkenaan dengan kos menaik taraf/membaik pulih mesin memotong dan meluruskan wayar; (k) RM3,682 dan RM1,620 berkenaan dengan membaiki forklift; (l) RM16,000 berkenaan dengan kerugian secara umum; dan (m) RM30,000 berkenaan dengan kerugian pencerobohan. Dalam rayuan ini, perayu telah merayu terhadap dapatan liabiliti bagi pencerobohan dan konversi bersama-sama dengan tuntutan responden-responden yang diaward oleh mahkamah sesyen dan juga penolakan atau penolakan award tuntutan balas perayu yang terdiri daripada kemungkiran penyewaan oleh responden pertama dan kos pembaikan bagi kerosakan kepada bangunan itu.

Diputuskan, membenarkan sebahagian rayuan dengan kos sebanyak RM1,500:

(1) Kewujudan sewaan antara kedua-dua responden dan pengetahuan perayu tentangnya adalah dapatan fakta penting oleh hakim yang bijaksana dan amat jarang diusik oleh mahkamah rayuan. Tambahan lagi, tidak terdapat pelanggaran larangan PJB itu kerana perjanjian sewaan itu telah ditandatangani sebelum penyempurnaan PJB. Hakim yang bijaksana mendapati bahawa responden-responden telah membayar sewa dalam tempoh yang munasabah kerana tidak terdapat masa yang ditetapkan bagi pembayaran sewa dahuluan dalam klausa 11 PJB. Selanjutnya, hakim yang bijaksana telah mendapati bahawa perayu bertanggungan dalam kerugian pencerobohan dan juga konversi catel kepunyaan responden-responden yang telah hilang atau rosak. Mahkamah mendapati tidak terdapat kesilapan dalam analisis dan dapatan oleh hakim yang bijaksana yang menghendaki campur tangan rayuan (lihat perenggan 20–22).

(2) Mahkamah mengesahkan award yang diberikan berkenaan dengan motor kren gantung CDI, tong minyak, bekas keluli, bahan gentian perniagaan, paip ABS, pembaikan forklift dan faedah sebanyak 5% setahun. Mahkamah mengenepikan award bagi bar bulat keluli lembut kerana terdapat kegagalan hakim yang bijaksana untuk menilai keterangan yang dikemukakan. Selanjutnya, berkenaan dengan award bagi penggantian/penambahbaikan mesin memotong dan meluruskan wayar, mahkamah mendapati bahawa ia merupakan perbelanjaan berbangkit tidak langsung yang terlalu kecil dan tidak dapat dijangka secara munasabahnya, maka tidak boleh dituntut dalam suatu tuntutan tort. Oleh sebab itu, award ini juga turut diketepikan. Akhir sekali, mahkamah mengenepikan award berjumlah RM16,000 bagi kerugian kerana terdapat kependuaan (lihat perenggan 29, 33, 43, 45, 54, 58, 61, 66, 71, 75 & 83).

(3) Berkenaan dengan award bagi plat keluli lembut, hakim yang bijaksana adalah betul untuk memberi award berdasarkan kepada apa yang dapat dilihat dalam gambar yang diekshibitkan sahaja. Walau bagaimanapun, sepatutnya hanya terdapat dua dan bukan tiga keping plat keluli lembut yang telah diawardkan. Berkenaan dengan kuantum, plat keluli lembut yang digunakan untuk akses forklift merupakan sesuatu yang rendah nilainya hanya pada masa itu sahaja. Oleh itu, award bagi plat keluli lembut itu dikurangkan kepada RM1,837.50 daripada RM19,603.20. Berkenaan dengan award bagi besi buruk, mahkamah mendapati bilangan besi buruk dan komponen besi tidak melebihi dua tan, oleh itu, mahkamah mengurangkan award itu kepada RM2,100 daripada RM31,500. Akhir sekali, berkenaan dengan award bagi mesin memotong dan meluruskan wayar, mahkamah mendapati bahawa

komponen mesin yang hilang itu hanyalah satu daripada tujuh bahagian mesin itu dan ia hanyalah sebuah mesin lama, oleh itu, mahkamah mengurangkan award itu kepada RM39,142 daripada RM117,425 (lihat perenggan 35–37, 40, 50 & 83).

(4) Berkenaan dengan tuntutan balas oleh perayu, memandangkan kesalahan pencerobohan telah didapati oleh hakim mahkamah sesyen yang telah disahkan oleh mahkamah ini, mahkamah memutuskan bahawa tuntutan perayu untuk sewa bagi sebulan tidak dapat dipertahankan. Oleh itu, penepian tuntutan itu disahkan oleh mahkamah ini. Sebagai tambahan, terdapat banyak gambar yang relevan yang menunjukkan kerosakan dan bukti dokumentar berkenaan dengan kos pemulihan/pembaikan yang ditanggung. Hakim yang bijaksana adalah betul apabila mengenepikan tuntutan kos pemulihan bagi kerosakan kepada bangunan itu (lihat perenggan 78 & 82).]

Notes

For cases on trespass in general, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2396–2398.

Cases referred to

Am General Insurance Bhd v Ravindren Ragavan & Ors [2016] 1 LNS 525, HC (refd)

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

CIMB Bank Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd [2015] 1 MLJ 74, CA (refd)

Cotton Home Sdn Bhd v Wong Kau @ Wong Kon Lin & Anor [2014] 3 MLJ 580, CA (refd)

KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling [2015] 7 MLJ 10, HC (folld)

Lee Guan Par v Hotel Universal Sdn Bhd [2005] 4 MLJ 589; [2005] 3 CLJ 1, CA (refd)

Lim Kim Chet v Multar bin Masngud [1984] 2 MLJ 165, PC (refd)

Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd [2017] 2 MLJ 592; [2018] 5 CLJ 185, CA (folld)

Mitsuho Electronics Sdn Bhd v Allswell Packagings Sdn Bhd [2015] 1 MLJ 198, CA (folld)

Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound [1961] 1 All ER 404; [1961] AC 338, PC (folld)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (folld)

Tan Wee Choon v Ong Peck Seng & Anor [1986] 1 MLJ 322 (folld)

Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd [2018] MLJU 594, FC (refd)
Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd [2006] 6 MLJ 24; [2006] 8 CLJ 657, HC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)
UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] MLJU 2225; [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Rules of Court 2012 O 55 r 2, O 56

Tan Swee Cheng (SC Tan) for the appellant.
Cynthia Lee (Jugeet Kaur a/p Hakam Singh with her) (Annual & Foong) for the respondents.

Lim Chong Fong J:

INTRODUCTION

[1] This is an appeal against the trial decision of the Butterworth Sessions Court in respect of a claim of trespass to land and goods and conversion of goods as well as a counterclaim for breach of tenancy agreement respectively.

[2] The appellant is a private limited company and the defendant in Butterworth Sessions Court Suit No B52–51–09 of 2013 ('suit').

[3] The respondents are related private limited companies and the plaintiffs in the suit.

SALIENT FACTS

[4] The respondents are dealers and manufacturers of hardware, building materials, machinery and spare parts. The first respondent was the registered owner of the property known as Lot No PT 314 and Lot No PT 338 Mukim 13, Daerah Seberang Perai Tengah, Negeri Pulau Pinang held respectively under HS(D) No 42610 and HS(D) No 42616 together with factory premises thereon ('property'). They jointly operated their business in the property whereby the second respondent paid rent to the first respondent by virtue of a tenancy agreement.

[5] By a sale and purchase agreement dated 6 December 2011 ('SPA'), the first respondent sold the property to the appellant. The sale of the property was

completed on 23 July 2012 upon the settlement of the full purchase price. That notwithstanding, the appellant permitted the first respondent to continue to occupy the property by renting it from the appellant pursuant to cl 11 of the SPA based on monthly payment of rental.

[6] On 3 October 2012, the appellant's solicitors wrote to the first respondent's solicitors and demanded for payment of the outstanding rental of the property for the period 23 September 2012–22 October 2012. Again on 4 October 2012, the appellant's solicitors wrote to the first respondent's solicitors giving 48 hours to settle the aforesaid outstanding rental.

[7] Notwithstanding that the rental was paid by the first respondent to the appellant's solicitors on 8 October 2012 at 1.05pm, the appellant and his agents on the same day at 2pm entered the property and demanded that the occupants thereon forthwith vacate the property. The appellant thereafter locked up the factory and the main gate of the property.

[8] Finally after a series of exchange of correspondences by their respective solicitors, the parties agreed that the respondents were permitted to retrieve their materials, goods and equipment left on the property on 9 November 2012.

[9] On 9 November 2012, the respondents re-entered the property and discovered that much of their materials as well as many of their goods and equipment left on the property were missing and damaged. As a result, the respondents lodged their police reports.

[10] In addition, the respondents on 3 September 2013 filed the suit.

[11] After 13 days of trial involving 19 witnesses, the learned sessions court judge allowed the following part of the respondents' claims and accordingly entered judgment together with interest thereon at the rate of 5%pa from 8 October 2012 until full and final settlement and costs:

(a) RM3,500 in respect of the motor for the CDI overhead crane as pleaded in para 16(c) of the amended statement of claim;

(b) RM17,500 in respect of the mild steel rounds bars as pleaded in para 16(d) of the amended statement of claim;

(c) RM19,603.29 in respect of the mild steel plates as pleaded in para 16(e) of the amended statement of claim;

(d) RM31,500 in respect of the scrap metal as pleaded in para 16(f) of the amended statement of claim;

(e) RM1,426 in respect of a barrel of oil as pleaded in para 16(g) of the amended statement of claim;

(f) RM6,200 in respect of two metal containers/dustbin-skip as pleaded in para 16(h) of the amended statement of claim;

(g) RM117,425 in respect of a unit of wire cutting and straightening machine as pleaded in para 16(i) of the amended statement of claim;

(h) RM1,026 in respect of the spare/replaceable business materials as pleaded in para 16(l) of the amended statement of claim;

(i) RM1,395 in respect of the ABS pipes as pleaded in para 16(n) of the amended statement of claim;

(j) RM12,500 in respect of the costs of the upgrading/refurbishing of wire cutting and straightening machines as pleaded in para 16(o) of the amended statement of claim;

(k) RM3,682 and RM1,620 in respect of the repair of forklifts as pleaded in para 18(a) and 18(d) of the amended statement of claim respectively;

(l) RM16,000 in respect of damages generally as pleaded in para 21(c) of the amended statement of claim; and

(m) RM30,000 in respect of damages for trespass as pleaded in para 21(d) of the amended statement of claim.

[12] The appellant is dissatisfied with the judgment of the sessions court and has on 26 October 2017 filed its notice of appeal to the High Court. The appeal came before me and after having read the appeal record, written submissions of the parties as well as their executive summary of appeal as further ordered by me, I heard counsel on 3 April 2018, 15 May 2018 and 7 June 2018. I thereafter adjourned my decision to deliberate on the arguments advanced by counsel.

[13] Now having so duly deliberated, I give my decision below together with the supporting grounds.

CONTENTIONS AND FINDINGS

[14] My duty here is encapsulated in O 55 r 2 of the Rules of Court 2012 that reads:

> 55 Appeals to high court from subordinate courts
>
> 2 Appeal to be by re-hearing on notice (O 55 r 2)
>
> All appeals to the High Court shall be by way of re-hearing and shall be brought by giving a notice of appeal within fourteen days from the date of the decision appealed from.

In *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241, Edgar Joseph Jr FCJ held as follows:

> With respect, in appeals to a judge in chambers from the decision of a registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts.
>
> Such appeals from decisions of the registrar are by way of an actual re-hearing and the judge treats the matter as though it comes before him for the first time.
>
> The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply.

Thus unlike appeals from registrars made pursuant to O 56 of the Rules of Court 2012 which operates as an actual re-hearing, my duty here is only to re-hear the decision of the sessions court in the manner of review from the appeal record.

[15] In undertaking the review, the law relating to appellate intervention in this respect has been succinctly set out by Raus Shariff FCJ (later CJ) in the case of *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785 as follows:

> ... It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Watt (or Thomas) v Thomas* [1947] 1 All ER 582; [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

Additionally in the Privy Council case of *Lim Kim Chet v Multar bin Masngud* [1984] 2 MLJ 165, Lord Keith of Kinkel held as follows:

> In their Lordships' opinion the reasons for his judgment given by the learned trial judge were unsatisfactory and in respects contradictory of each other. It seems to their Lordships that this is very clearly a case where consistently with the principles laid down by Lord Thankerton in Thomas v Thomas, the Federal Court were entitled to review the findings of fact of the trial judge and to reach their own conclusion upon the evidence.

[16] The appellant here is appealing against the findings of liability for trespass and conversion together with the respondents' associated heads of claim awarded by the sessions court as well as the dismissal or non-award of the appellant's heads of counterclaim comprising of breach of tenancy by the first respondent and rectification costs for damage to the property. I propose to deal with them individually *seriatim* after having gone through the 29 pages of grounds of judgment of the learned sessions court judge.

A TRESPASS AND CONVERSION

[17] The findings on liability for trespass and conversion are dealt with in paras 27–47 of the grounds of judgment of the learned sessions court judge.

B

[18] However, the appellant primarily in gist contended that the learned judge erred in fact and law because the appellant had no knowledge that the property was rented by the first respondent to the second respondent as there was a prohibition against sub tenancy in cl 9 of the SPA. The respondents therefore could not take advantage of their own wrong as held, inter alia, in C *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 and *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597. That aside, the appellant contended that the learned judge also erred by finding that the rental of the property was not D payable in advance. Consequently, the learned judge further erred in fact and law that the appellant trespassed into the property and converted chattels belonging to the respondents.

[19] According to the learned sessions court judge, the parties from the E surrounding circumstances and from the beginning had a cordial relationship. There were no serious issues even though the completion of the SPA was delayed. The respondents submitted that both respondents were in fact the same entity as far as it concerned the occupation of the property. There was a tenancy agreement executed between them on 5 March 2012.

F

[20] This existence of a tenancy between the two respondents and knowledge of the appellant thereof are essentially findings of fact of the learned judge and will rarely be disturbed by the appellate court. As I have held in *Am General Insurance Bhd v Ravindren Ragavan & Ors* [2016] 1 LNS 525, this is G because the trial judge had the distinct benefit of assessing the demeanour and credibility of the witnesses who testified at the trial. Moreover, I observed that the tenancy agreement between the respondents was executed before the completion of the SPA. Consequently, there was no breach of the prohibition stipulated in the SPA contrary to that as alleged by the appellant.

H

[21] In addition and as found by the learned judge, there was no tenancy agreement executed by the parties after the completion of the SPA and the respondents were occupying the property as tenants holding over as provided in cl 11 of the SPA. Based on that provision, there is no stipulated time of I payment of rent in advance. In the premise, the learned judge basically found that the first respondent paid the rent to the appellant on 8 October 2012 within reasonable time in light of the circumstances that prevailed at the material time. I have reviewed the findings of the learned judge and do not see any error that warrants appellate intervention.

[22] Accordingly, the learned judge found that the appellant trespassed onto the property on 8 October 2012 and prohibited the respondents from removing all their chattels in the property thereafter. Based on the case of *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24; [2006] 8 CLJ 657, the learned judge found that the respondents had sufficiently proven actionable trespass against the appellant notwithstanding that the appellant was the new and rightful owner of the property. In other words, the respondents were unlawfully ejected from their lawful occupation of the property that was prematurely and wrongly terminated by the appellant. As a result, the appellant is liable in damages for trespass following *Tan Wee Choon v Ong Peck Seng & Anor* [1986] 1 MLJ 322 and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500 as submitted by the respondents. Furthermore, the appellant is also liable for conversion of the chattels belonging to the respondents that were lost or damaged following *Mitsuho Electronics Sdn Bhd v Allswell Packagings Sdn Bhd* [2015] 1 MLJ 198 and *Mewah-Oils Sdn Bhd v Lushing Traders Pte Ltd* [2017] 2 MLJ 592; [2018] 5 CLJ 185. I have again reviewed the analysis and findings of the learned judge and do not detect any error that necessitated appellate intervention.

[23] Following my affirmation of the learned sessions court judge's findings of liability for trespass and conversion, I move on to examine the heads of claim and counterclaims as awarded.

Motor for the CDI overhead crane

[24] Generally, the appellant submitted that Abu Samah JCA (later FCJ) held as follows in *Cotton Home Sdn Bhd v Wong Kau @ Wong Kon Lin & Anor* [2014] 3 MLJ 580:

> [31] It is trite law that special damages must be specially proved. Once the trial court accepted that the respondents had failed to substantiate their claim for special damages, the proper order would be to dismiss the claim and not to award a reduced figure based on conjecture.

[25] According to the appellant, the learned sessions court judge therefore erred in fact and law by finding for the respondents notwithstanding there was no documentary evidence adduced in respect of the existence and loss of the motor claimed. My review of the learned sessions court judge's grounds of judgment discloses that she made her decision relying on the oral testimony of SP1 and SP2 as well as the photograph (exh 95D) where the missing motor was last placed. The motor was allegedly placed on the apron of the factory which is sheltered by an overhang roof. The photograph which was taken on 8 November 2012 however showed the motor was no longer there.

[26] It is primarily the finding of the learned sessions court judge that the motor was left there on 8 October 2012 because there was insufficient time to remove it. In my view, it would have been ideal if the respondents had photographed the motor as last placed on 8 October 2012 but it is not fatal that that was not done. The learned judge is perfectly entitled to alternatively rely on the testimony of the witnesses particularly SP2 who has personal knowledge of it as seen from his witness statement. Ultimately, this issue turns on the sessions court judge's assessment of their credibility and I should normally be hesitant to disturb her findings because I did not enjoy the audio-video advantage of seeing the witnesses in action. In *CIMB Bank Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd* [2015] 1 MLJ 74, Zawawi Salleh JCA (now FCJ) held as follows:

> [12] Before we embark upon the task of determining the merits or otherwise of the appeal, we would like to state at the outset that we were mindful of the principles of law that in respect of an appeal which turns upon a question of fact, an appellate court is generally very reluctant to disturb a finding of fact by the trial judge for the reason that as trier of fact, the trial judge has audio-visual advantage which we did not have. Nonetheless, it would be open to us to intervene with the finding by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself (see *Gan Yook Chin & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523).

[27] Upon my review, I noticed that the alleged missing motor is corroborated by the need to have the motor replaced as evidenced by the invoice of Liftech Engineering (Pg) Sdn Bhd dated 18 January 2013 (exh P44).

[28] As to the quantum of the award of RM3,500, I find that the learned judge rightly and fairly relied on the aforesaid invoice.

[29] In the premise, the award of the sessions court is affirmed.

Mild steel round bars

[30] The appellant contended that the learned sessions court judge erred again in fact and law by deciding that the seven bundles of mild steel round bars were lost solely relying on the testimony of SP1 and SP2 without producing documentary evidence by way of the manufacturing and stock records which SP1 admitted were available.

[31] I however observed that the learned judge basically relied on the testimony of SP1 and SP2 and the delivery order (exh P46) as confirmed by SP7.

[32] Upon my review, I find that SP1 testified in his witness statement that the missing seven bundles of mild steel bars were 11.2mm in diameter. However in the delivery order (exh P46) adduced as proof, there were 19 bundles of low carbon wire rods of 10mm diameter that were delivered on 27 June 2012. Low carbon wire rods are definitely not synonymous with the allegedly missing mild steel bars. They are technically different. Moreover, they were delivered to the property more than three months prior to 8 October 2012 and may have been utilised in the respondents' manufacturing process unless otherwise rebutted by the stock records which SP1 acknowledged were available but not produced in court.

[33] This is thus an instance warranting appellate intervention because there was insufficient judicial appreciation of the evidence adduced by the learned judge. This award is hence set aside.

Mild steel plates

[34] The appellant contended that the learned sessions court judge again erred in fact and law by deciding that there were only three mild steel plates missing amounting to RM19,603 as opposed to the many more mild steel plates allegedly missing amounting to RM293,661.66. The learned judge based her award on the evidence of SP1 and SP2 that there were many mild steel plates placed all over the property and the photographs taken on 8 October 2012 (exhs P53E and P53F) showed the existence of three mild steel plates only.

[35] Upon my review, I find that the relevant photographs were actually exhs P53G and P53H. There were only two pieces of mild steel plates seen on the uneven factory floor of the property primarily for forklift access. The learned judge was therefore correct to award for what was visible from the photographs only. In this regard, there should only be two instead of three pieces of mild steel plates that have been awarded.

[36] As to the quantum, the two pieces of mild steel plates that were used for forklift access are in my view of scrap value only at the material time. The learned judge however fell into error by arbitrarily adopting the claim for three pieces that were pleaded in item 9 of schedule A to the statement of claim. In my opinion, the mild steel plates looked about 18 feet in length from the photographs and about 10mm thickness to withstand the dynamic loading of the forklifts. Hence and based on a typical delivery order of mild steel plates such as that in item 1 of exh P54B produced by the respondents, the weight per piece of mild steel plate is approximately 875.24kg or 0.875 tonnes. As testified by SP9, the scrap value of metal at that material time in 2012 is RM1,050/tonne.

[37] Consequently, the fair award of the mild steel plates ought to be two pieces x 0.875 tonnes/piece x RM1,050/tonne = RM1,837.50 and the learned judge's award is adjusted down accordingly.

Scrap metal

[38] The appellant contended that the learned sessions court judge erred in fact and law by deciding that there was 30 tonnes of scrap metal wrongly disposed away by the respondents based on the photographs dated 8 October 2012 adduced (exhs P83A and P83C).

[39] Upon my review of the photographs, the scrap metal in one photograph (exh P83A) is undoubtedly metal conduits for housing of electrical cables. They were fixtures of the property and belonged to the appellant pursuant to the SPA as submitted by the appellant. The scrap metal in the other photograph (exh P83C) is waste metal components.

[40] The learned judge therefore fell into error here for having failed to judicially appreciate the evidence fully and submissions put before her, specifically in relation to the metal conduits. In any event, I am doubtful that the weight of those conduits weighed 30 tonnes as stated in her grounds of judgment or even 12.85 tonnes as eventually used by her to compute the award of RM31,500. It was a sum arbitrarily stated by the respondents but I estimate the quantity of scrap metal waste metal components would at best not exceed two tonnes from the photograph. Hence the fair award should have been two tonnes x RM1,050/tonne as testified by SP9 = RM2,100 and the award is so varied accordingly.

Barrel of oil

[41] The appellant contended the learned sessions court judge erred in fact and law for failing to find that the missing barrel of oil was subsequently removed by the respondent's lorry driver.

[42] It is clear that the learned judge made her decision in reliance of the photographs taken on 8 October 2012 (exhs P53G and P53H) as well as the photograph taken on 9 November 2012 (exh P53C). By comparing these photographs, it could not be disputed that the barrel of oil has gone missing. Although differing answers might seemingly have been given by SP1 on removal of the barrel of oil by the lorry driver, this issue turns on the credibility of the witness and I defer to the finding of the learned judge who enjoyed the audio-video advantage of the giving of his testimony.

[43] As to the quantum awarded, the learned judge principally relied on an invoice dated 30 October 2012 (exh P85 and not exh P58 as erroneously typed by her) as representative pricing of a barrel of the oil purchased by the respondents. I do not find that to be wrong or improper and hence affirm this award.

Metal containers/dustbin skips

[44] The appellant contended here that the learned judge erred in fact and law by failing to find that the appellant rightly disposed of the containers/dustbin skips by virtue of the respondent's failure to collect them on 7 November 2012 after notifications were made to the respondents' solicitors.

[45] The existence of the containers/dustbin skips do not seem to be in dispute. As found by the learned judge, the containers/dustbin skips were disposed off by the appellant as admitted by SD1. However and as implicitly found by the learned judge, I hold that the appellant must nonetheless still account to the respondents for the value of the disposed containers/dustbin skips. This was not done and I do not find that it was wrong or improper for the learned judge to hence make the award on quantum based on the documentary evidence tendered by the respondents in exhs P88 to P94 as well as the testimony of SP3. Consequently, this award is affirmed.

Wire cutting and straightening machine

[46] The appellant contended that the learned sessions court judge erred in fact and law when she found for the respondents without documentary evidence adduced by them in respect of the existence and loss of the major machine component.

[47] Just as in the case of the motor for the overhead crane, my review of the learned sessions court judge's grounds of judgment discloses that she made her decision relying on the oral testimony of SP1 and SP2 as well as the photograph taken on 8 October 2012 (exh 95B) where the machine component of the wire cutting and straightening machine was last placed on the apron of the factory which is sheltered by an overhang roof. There was only one machine seen. However, it is plain that the machine component is missing in the photograph taken on 9 November 2012.

[48] Likewise as for the motor of the overhead crane, the learned judge accepted the explanation of SP1 and SP2 that the machine component was usable and functioning but was put outside on the apron temporarily for onward transmission to the respondents' new premises. Again it is ultimately

her assessment of their credibility and I should not disturb her findings because I did not enjoy the audio-video advantage of seeing the witnesses in action.

[49] As to the quantum, the appellant contended that the machine component was in fact scrap metal because it was placed exposed in the open to rain amongst other rubbish as seen from the photographs tendered by the respondents. I do not think so by reason that it was only temporarily placed there awaiting removal as testified by SP1 and SP2 which was accepted by the learned judge. Besides, the apron where the machine was placed is sheltered by an overhang roof. The rubbish seen there was most probably also temporarily placed awaiting disposal. The place as captured in the photographs is not a permanent refuse collection centre.

[50] In respect of the quantum, the learned sessions court judge averaged it by only halving the costs of the two new wire cutting and straightening machines of a different brand later purchased by the respondents in early 2013 based on SP1 and SP6s' testimony and the documentary evidence tendered by them (exhs P96, P98(a) and P99–P105). I am however of the opinion that this computation is overly generous. The lost machine component was only one of seven parts of the wire cutting and straightening machine as testified by SP1. Besides that, it was also an old machine. There must hence be an adjustment made for partial replacement only as well as betterment. In the circumstances, I hold that a fair award should be 1/3 x RM117,425 = RM39,142 and the award is adjusted down accordingly.

Spare/replaceable business materials

[51] The appellant contended that the learned sessions court judge erred in fact and law in allowing the claim for the loss in the absence of any documentary evidence adduced by the respondents.

[52] According to the learned sessions court judge, she based it on the photograph taken on 8 October 2012 (exh P106A) where a box with spare parts is seen as compared with the photographs taken 9 November 2012 (exhs P106C and P106D) where the box is no longer in existence aside from the testimony of SP2.

[53] In relation to the quantum, the learned judge accepted the testimony of SP4 taken together with the documentary evidence adduced (exhs P110–P111 and P112B).

[54] I have no reason to doubt or disturb the learned judge's findings here. This award is thus affirmed.

ABS pipes

[55] The appellant contended that the learned judge erred in fact and law by awarding for the loss five pieces of the pipe without documentary evidence to substantiate them.

[56] From my review, I find that the learned judge must have relied on the testimony of SP1 and photograph taken on 8 October 2012 (exhs P53G and P53H) where five pipes are visible as compared to the photographs taken on 9 November 2012 (exhs P53C, P53D, P106C and P106D) where no pipe is seen.

[57] As to the quantum, I noted that the learned judge relied on the invoice of Cipli Industries Sdn Bhd dated 25 May 2012 (exh P119) in respect of 100mm x 5.8m ABS pipes as a guide in respect of the market price.

[58] I do not therefore see that there is an appealable error on the part of the learned judge and this award is hence affirmed.

Upgrading/refurbishing of wire cutting and straightening machines

[59] The appellant contended that the learned sessions court judge erred in fact and law by allowing the upgrade/repair costs of two machines rendered unusable because of the loss of the machine component without documentary evidence proving the same.

[60] Upon my review of the learned judge's grounds of judgment, she made her award because she found that the respondents had to purchase two new machines in consequence of the loss of the machine component. Since the machines were essential to the respondents' business, the learned judge felt it was reasonable for the respondents to upgrade the other usable machine of the respondents so that it could produce more steel bars while awaiting the arrival of the two new machines.

[61] This head of claim for costs which is in fact the upgrading of another machine amounting RM12,500 is connected with the claim in item (vii) on the wire cutting and straightening machine above. It is actually not the repair of an existing machine but modification of it to produce longer length steel bars. In other words, it was a betterment of another machine for long term usage. Consequently it is in my opinion an indirect expense arising that is remote and not reasonably foreseeable, thus not claimable in tort claims following *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound* [1961] 1 All ER 404; [1961] AC 338 and adopted in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd* [2018] MLJU 594.

[62] In the premise, this award is set aside.

Repair of forklifts

[63] The appellant contended that the learned sessions court judge erred in fact and law by having found that the forklift keys were missing notwithstanding that it was admitted that the keys were in the switches of the forklifts.

[64] From my review of the appeal record particularly the grounds of judgment and notes of proceedings, I find that there was cogent testimony of SP1 and SP2 as well as SD1 and SD2 on the usage and the consequential damage to the forklifts by the appellant. Thus the learned judge's findings are justified. I noted that there were photographs tendered on the damage that resulted in an oil leak which have been accepted by the learned judge. However, the photographs reproduced in the appeal record are too blur to enable me to make any meaningful review. In any event, the question of usage and resultant damage centred on the credibility of witnesses where the findings of the trial judge would rarely be disturbed.

[65] As to the quantum, the learned judge primarily relied on the invoice (exh P131) and testimony of SP10. They do not seem to be wrong in my opinion to justify appellate intervention.

[66] Hence, this award is affirmed.

Damages and damages for trespass

[67] They are related and I will deal with them together.

[68] Basically, the appellant contended that there is duplicity because they were awarded based on the same facts of trespass on 8 October 2012. There is therefore unjust enrichment.

[69] From my review of the grounds of judgment, I see that the learned sessions court judge awarded RM16,000 in damages for pre-mature eviction of 16 days before expiry of the agreed extended tenancy period. The damages were prorated from a month's rent. In addition, she awarded a month rent of RM30,000 as damages for trespass because the respondents were already slowly in the process of moving out.

[70] According to the respondent, there is no duplication because the RM16,000 was awarded as damages for conversion as claimed.

[71] This is misplaced by reason that it is clear the learned judge had separately dealt with damages for conversion in para 86 of her grounds of judgment by refusing it because the claim had already been allowed for in the individual items claimed. In the premise, I find and hold that there is duplicity and the award of RM16,000 is hence set aside.

Interest at 5%pa

[72] The appellant contended that the learned judge unreasonably awarded pre judgment interest from the date of the trespass without submission of counsel following *Tuan Haji Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30. In this respect, the learned judge was not cognisant that the respondents delayed the filing of the suit for nine months after the notice of demand was sent.

[73] The award of pre judgment interest is governed by s 11 of the Civil Law Act 1956 which provides as follows:

> 11 Power of Court to award interest on debts and damages
>
> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> *Provided that nothing in this section —*
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.'

[74] This is primarily an exercise of discretion as held in *Lee Guan Par v Hotel Universal Sdn Bhd* [2005] 4 MLJ 589; [2005] 3 CLJ 1. On my review, I do not find that the learned sessions court judge either improperly or unreasonably awarded pre judgment interest as so ordered notwithstanding that the suit was filed nine months after the notice of demand was sent.

[75] Consequently, the prejudgment interest awarded is affirmed.

Appellant's counterclaim

[76] The appellant firstly contended that the learned sessions court judge failed to consider that the first respondent covenanted with the appellant to

rent the property for four months from 23 July 2012. Since the first respondent only paid rental until the third month, there is still a shortfall of a month's rent.

[77] On the other side, the respondents contended that the appellant wrongly terminated the tenancy as covenanted by trespassing on the property on 8 October 2012 and evicting the respondents' workers besides locking up the factory thereon.

[78] Since trespass has been found by the learned sessions court judge which has been affirmed by me, I hold that the appellant's claim for a month's rent is unsustainable. The dismissal of the claim is thus affirmed.

[79] The appellant secondly contended that the learned sessions court judge failed to consider and make an award for the rectification costs incurred to replace the electrical main wiring, repair of metal works and cement floor.

[80] The respondent in opposition contended that the appellant failed to specifically prove both the cause and damage sustained and that was accepted by the learned judge.

[81] In my opinion, this is essentially evidential. I have held as follows in *KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling* [2015] 7 MLJ 10 with emphasis added:

> [63] The defendant's cross-claim is massive comprising of essentially three heads of claim. Firstly there is special damages amounting to RM1,065,370.92 for remedying and rectifying multiple, gross and latent defects as submitted. In this respect, the defendant has in substantiation produced the invoices of her rectification contractors such as Walk & Turn Builders, Shin Tat Construction Trading Sdn Bhd, DJ Deconway Furniture, Itex Power Enterprises, Kim Soon Electrical Engineering, etc that accumulated to that amount. There is no serious dispute that the defendant has paid against these invoices.
>
> [64] On scrutiny of the invoices, I find that the items therein comprise of purported remedial work beyond those dealt under the third issue herein. In other words, there is a lot of other unexplained work. The defendant has merely collated all her payments made to the rectification contractors and held them entirely to the account of the plaintiff. This is plainly unsatisfactory and does not meet the requirement of proof of damages as held by the court of appeal in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 1 CLJ 611; [2007] 2 AMR 229. In building contract litigation, *I have expected the complainant to carefully sieve through and tabulate each and every relevant defect and the costs of remedying them systematically preferably also in a Scott schedule. The tabulation must cross-refer to the defect as substantiated preferably by photographic records or other cogent mode of proof together with the corresponding item of expenses or costs incurred to remedy the defect as substantiated by the work invoices.* The complainant must in honesty disregard those works that constituted improvement or addition/modification

rather than rectification. In short, the complainant cannot 'throw the whole kitchen sink' of alleged unprocessed defects and expenses to the court to have them sorted out as presented by the defendant here.

This is in my view applicable here notwithstanding that it has been held initially in the context of a construction contract claim. Thus and upon my review of the evidence adduced particularly the admissible documentary evidence, the appellant had not objectively proved its claim to the requisite standard. There is dearth of relevant photographs evidencing the alleged damage and the cogent corresponding documentary proof of rectification/repair costs incurred. The learned judge is therefore correct in dismissing the claim.

CONCLUSION

[82] In summary and for the foregoing reasons, the appeal is therefore allowed in part as follows:

(a) the award for the mild steel rounds bars amounting to RM17,500 is set aside;

(b) the award for the mild steel plates is varied to RM1,837.50 from RM19,603.20;

(c) the award for the scrap metal is varied to RM2,100 from RM31,500;

(d) the award for the wire cutting and straightening machines is varied to RM39,142 from RM117,425;

(e) the award for replacing/refurbishing the wire cutting and straightening machine of RM12,500 is set aside; and

(f) the award of RM16,000 damages is set aside.

The rest of the awards and non awards are affirmed. The respondents shall pay the appellant cost for this appeal amounting to RM1,500 and the costs below shall be adjusted based on the awards and non awards that are affirmed as well as varied only.

Appeal allowed in part with costs of RM1,500.

Reported by Dzulqarnain Ab Fatar